

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
DOCKET NO. 1872CR00084

COMMONWEALTH,

v.

THOMAS LATANOWICH,
Defendant

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**OPPOSITION OF THE KEEPER OF THE RECORDS
OF THE BOURNE POLICE DEPARTMENT
TO THE DEFENDANT'S MOTION FOR A RULE 17 SUMMONS**

Now comes the Keeper of the Records of the Bourne Police Department and hereby submits this Opposition to the Defendant's Motion For A Rule 17 Summons To Be Directed To The Bourne Police Department.

ARGUMENT

1. The Rule

Rule 17 of the Massachusetts Rules of Criminal Procedure provides as follows:

A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers,

documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

2. The Law.

Rule 17 confers upon the Court discretionary authority to order the production of books, papers, documents, or objects, prior to trial. Smith, Criminal Practice and Procedure, 30A Mass. Practice § 1559.

The purpose of the Rule is to expedite the progress of trials – in that the trial is not delayed while counsel is examining numerous documents produced in response to a summons. *Id.*, citing United States v. Marcello, 423 F.2D 993 (5th Cir. 1970), *cert denied* 398 U.S. 959. *The purpose of the Rule is not for discovery.* *Id.* This was confirmed by the SJC in Commonwealth v. Odgren, 455 Mass. 171, 181 (2009), where the Court said that Rule 17 is "not intended to permit the use of summonses to subvert the discovery rule, Mass. R.Crim. P. 14."

In Commonwealth v. Lampron, 441 Mass. 265 (2004), the SJC defined the Court's discretionary authority under Rule 17 by adopting the federal standard:

... the party moving to subpoena documents to be produced before trial must establish good cause, satisfied by a showing: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" United States v. Nixon, 418 U.S. 683, 699-700 (1974). A defendant is required to make a factual showing that the documents sought are relevant and have evidentiary value to the defense. United States v. Gikas, 112 F.R.D. 198, 201 (D. Mass. 1986). Potential relevance and conclusory statements regarding relevance are insufficient for a Federal rule 17 subpoena. See United States v. Jackson, 155 F.R.D. 664, 667-669 (D. Kan. 1994). Like the Massachusetts rule, Fed.

R. Crim. P. 17 is not a discovery tool. See United States v. Nixon, supra at 698. Because rule 17 is reserved for evidentiary materials that are likely to be admissible at hearing or at trial, see 2 C.A. Wright, Federal Practice and Procedure § 271 (3d ed. 2000); Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), and not invoked merely for the exploration of potential evidence, the evidentiary standard of relevance applies. Under our rule 17 (a) (2), as under rule 17 of the Federal rules, the defendant must show that the documentary evidence sought has a "rational tendency to prove [or disprove] an issue in the case." Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989), quoting Commonwealth v. Chretien, 383 Mass. 123, 136 (1981).

3. The Defendant's Motion Should Be Denied.

A. The Motion is a Fishing Expedition.

The Defendant's Motion seeks to obtain a capacious amount of records from the Town of Bourne Police Department. Review of the requests makes it manifest that the Motion is a *de facto* discovery motion, not a *bona fide* Rule 17 Motion. Indeed, the Motion is a transparent, bad faith, "fishing expedition" that is not allowed by the Rule.

B. The Motion Is Predicated On Conclusory Assertions.

The Defendant's Motion merely parrots the standard adopted in Lampron and asserts, in conclusory fashion, that the evidence is "relevant" and "material" and will be a "real benefit to the defense." Such conclusory statements have been ruled insufficient by the Lampron Court: "conclusory statements regarding relevance are insufficient for a [] rule 17 subpoena." Lampron, supra, citing United States v. Jackson, 155 F.R.D. 664, 667-669 (D. Kan. 1994).

C. The Information Being Sought Is Not Relevant and Will Not Be A Benefit To The Defense.

With one exception (Request No. 9), all of the requests set forth in Defendant's Motion seek documents that post-date the date of the alleged crime (April 12, 2018). Consequently, their benefit to the defense is highly suspect and their relevance is dubious. Moreover, the filed Affidavit fails to comport with the Lampron requirements: "A defendant is required to make a factual showing that the documents sought are relevant and have evidentiary value to the defense." Lampron, supra.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Keeper of the Records of the Bourne Police Department requests the Court to deny the Defendant's Motion.

Dated:

5-24-19

Respectfully submitted,
By the Keeper of the Records
Of the Bourne Police Department,
By its Attorney,



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